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State, Dept. of Transp. v. Grathol Appellant's Reply Brief 2 Dckt. 40168

IN THE SUPREME COURT OF THE STATE OF IDAHO

THE STATE OF IDAHO,
IDAHO TRANSPORTATION BOARD,

Plaintiff-Respondent-Cross-Appellant,

vs.

HJ GRATHOL, a California general partnership,

Defendant-Appellant-Cross-Respondent,

and

STERLING SAVINGS BANK, a Washington corporation; and DOES 1 through 5,

Defendants.

Supreme Court Docket No. 40168-2012

Kootenai County District Court
Case No. CV2010-10095

ITD'S REPLY BRIEF ON CROSS-APPEAL

Appeal from the District Court of the First Judicial District, State of Idaho,
County of Kootenai, Case No. CV2010-10095
Honorable Charles W. Hosack, Sr. District Judge, presiding

Douglas F. Marfice
Christopher D. Gabbert
RAMSDEN & LYONS, LLP
P.O. Box 1336
Coeur d'Alene, ID 83816-1336

Attorneys for Defendant-Appellant-Cross-Respondent

LAWRENCE G. WASDEN
ATTORNEY GENERAL
STATE OF IDAHO

STEVEN L. OLSEN
Deputy Attorney General
Chief, Civil Litigation Division

J. TIM THOMAS
Deputy Attorney General
Idaho Transportation Department
P.O. Box 7129
Boise, ID 83707-1129

Mary V. York
Steven C. Bowman
Special Deputy Attorneys General
HOLLAND & HART LLP
P.O. Box 2527
Boise, ID 83701-2527

Attorneys for Plaintiff-Respondent-Cross-Appellant

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Plaintiff-Respondent/Cross-Appellant, State of Idaho, Idaho Transportation Board, as the governing body of the Idaho Transportation Department (hereinafter "ITD"), now files its Reply Brief in support of its cross-appeal.

I. INTRODUCTION

ITD raises two issues on cross-appeal. The first issue is whether the District Court erred in holding that Idaho Code § 12-117 is the exclusive statutory basis for awarding attorney fees in condemnation cases. The second is whether, after finding ITD to be the prevailing party in this case, the District Court erred in failing to award reasonable attorney fees to ITD.

In response to ITD's cross-appeal, Defendant/Appellant HJ Grathol, a California general partnership ("Grathol") filed its second brief, *Appellant's Reply Brief* (hereinafter "Grathol's Reply Br."). In its reply brief, Grathol argues that the District Court properly denied ITD's request for attorney fees under Idaho Code § 12-117 because, according to Grathol, the statute is "the exclusive basis for awarding attorney's fees in actions involving state entities." Grathol's Reply Br. at 36 (citing *State, Dep't of Transp. v. HJ Grathol*, 153 Idaho 87, 278 P.3d 957 (2012) ("*Grathol I*") (emphasis in original omitted)). Grathol's argument is an incorrect statement of Idaho law.

The proper standard for attorney fee awards in condemnation actions was set forth by the Idaho Supreme Court in *Ada Cnty. Highway Dist. v. Acarrequi*, 105 Idaho 873, 877-78, 673 P.2d 1067, 1071-72 (1983) and two subsequent cases, *State ex rel. Ohman v. Talbot Family Trust*, 120 Idaho 825, 829, 820 P.2d 695, 699 (1991) and *State ex rel. Smith v. Jardine*, 130 Idaho 318, 321-22, 940 P.2d 1137, 1140-41 (1997). That standard has not been overturned by the Supreme Court nor has it been displaced by the provisions of § 12-117. In fact, the Idaho Supreme Court

recently confirmed that the *Acarrequi* standards control attorney fee awards in condemnation cases. *See Telford Lands LLC v. Cain*, 154 Idaho 981, 992, 303 P.3d 1237, 1248 (2013).

The Supreme Court also recently confirmed that "section 12-117(1) is *not* the exclusive basis upon which to seek an award of attorney fees against a state agency or political subdivision." *Syringa Networks, LLC v. Idaho Dept. of Admin.*, 155 Idaho 55, 67-68, 305 P.3d 499, 511-12 (2013) (emphasis added). As held by the Supreme Court in *Syringa*, "attorney fees may be awarded under any other statute that expressly applies to a state agency or political subdivision, such as sections 12-120(3) and 12-121." *Id.* The Court further held that the attorney fee provisions of §§ 12-117, 12-121, and 12-120(3) are *all* applicable to the State. *Id. See also Hehr v. City of McCall*, 155 Idaho 92, 99-100, 305 P.3d 536, 542-43 (2013) (holding that §§ 12-121 and 12-117 are both applicable to attorney fee requests in an inverse condemnation case involving a municipality). Thus, contrary to Grathol's assertions, the *Acarrequi* standards, which are based upon § 12-121, apply to condemnation cases and should have been applied by the District Court in this case.

Grathol has argued that condemnors are not allowed to recover attorney fees in condemnation cases. This argument is contrary to the holding in *Acarrequi* that such awards may be made "in the most extreme and unlikely situation[.]" *Acarrequi*, 105 Idaho at 878, 673 P.2d at 1072. A review of Grathol's conduct and abusive tactics throughout this case reflects exactly the type of extreme conduct implicitly contemplated by this Court in *Acarrequi.* The many and varied abuses and improper tactics by Grathol are listed in detail, with citations to the record, in ITD's first brief, *ITD*'s *Brief As Respondent And Opening Brief as Cross-Appellant* (hereinafter "ITD's Opening Br."), at 74-76. In addition, Grathol's two valuation witnesses,

Dewitt "Skip" Sherwood and Alan Johnson, employed many improper valuation methods and tactics that initiated a host of battles that never should have been necessary and involved fights over issues clearly barred by law or wholly unsupported by the facts in the case. Grathol's tactics substantially and unnecessarily increased the attorney fees and costs in this case. The improper methods and tactics of Sherwood and Johnson are listed in detail, with citations to the record, in ITD's Opening Br., at 76-77.

Because of Grathol's abusive tactics, unlawful claims, and improper valuation methodologies and abuses, before, during, and after the trial, this case became the epitome of extreme conduct, unnecessary and prolonged battles over matters clearly barred by law and fact, and consequent needless expenditure of great sums in fees and costs incurred to enforce compliance with court orders, the rules of civil procedure, discovery obligations, and to defeat unlawful, unsubstantiated, and exorbitant claims for compensation and damages. This is precisely the type of "extreme and unlikely" case contemplated by the Court in *Acarrequi* where fees should be awarded to the condemnor. *Acarrequi*, 105 Idaho at 878, 673 P.2d at 1072.

Based on the foregoing, if this case is not the "exceptional" case where the condemnor should recover reasonable attorney fees, as held by the Court in *Acarrequi*, then there is no exceptional case. In that event, landowners will have license to engage in these abuses and improper tactics with impunity. The law must provide a remedy under these circumstances.

II. ARGUMENT IN SUPPORT OF CROSS-APPEAL

A. Attorney Fee Awards In Condemnation Cases Are Governed By The Standards Announced In *Acarrequi* And Further Defined In *Talbot* And *Jardine*.

In Idaho, the standard for attorney fee awards in condemnation cases differs from the standards applied in other civil cases. *Telford Lands LLC*, 154 Idaho at 992-93, 303 P.3d at 1248-49. Generally, the award of costs and attorney fees is governed by Idaho Code § 12-121 and Rule 54 of the Idaho Rules of Civil Procedure, which provide that attorney fees and costs may be awarded to the prevailing party upon a finding that the case was brought, pursued, or defended frivolously, unreasonably, or without foundation. I.C. § 12-121; I.R.C.P. 54(d)(1), 54(e)(1).

By contrast, the award of attorney fees and costs in condemnation cases is governed by its own set of rules and applications. The particularized standards were announced in *Acarrequi*, 105 Idaho at 877-78, 673 P.2d at 1071-72, and refined in two subsequent cases, *Talbot*, 120 Idaho at 829, 820 P.2d at 699, and *Jardine*, 130 Idaho at 321-22, 940 P.2d at 1140-41.

As established in the *Acarrequi* line of cases, the award of attorney fees and costs in a condemnation case involves a two-part analysis: First, a determination must be made as to who the prevailing party is under Rule 54(d)(1)(B) and the guidelines established in *Acarrequi*. *Acarrequi*, 105 Idaho at 876-77, 673 P.2d at 1070-71; *Talbot*, 120 Idaho at 829, 820 P.2d at 699; and *Jardine*, 130 Idaho at 320-21, 940 P.2d at 1139-40. Second, once the prevailing party has been determined, the amount of attorney fees and costs to be awarded shall be determined based on the provisions of Rules 54(d)(1) and 54(e)(3).

Grathol does not contest or raise any issue on appeal challenging the District Court's determination that ITD was the prevailing party in the case. Grathol's sole argument on ITD's cross-appeal is that § 12-117 governs the award of attorney fees in this case. As discussed below, Grathol's argument is without merit or basis in law.

B. Attorney Fee Awards In Condemnation Cases Are Not Governed By Idaho Code § 12-117.

Grathol argues that § 12-117 is the exclusive grounds for attorney fee awards in cases involving the State and that the District Court properly denied attorney fees to ITD under that statute. Grathol's Reply Br. at 43 (citing *Alpine Village Co. v. City of McCall*, 154 Idaho 930, 303 P.3d 617 (2013)). Grathol's argument, and correspondingly the District Court's application of § 12-117 to ITD's attorney fee request, is contrary to Idaho law.

1. Separate Lines Of Idaho Case Law Developed Regarding Attorney Fee Awards In Cases Involving State Agencies—One Applicable To Condemnation Cases And One Applicable To Other Types Of Cases.

Contrary to Grathol's argument that § 12-117 applies to the present case, Idaho case law provides for separate lines of authority for attorney fee awards in cases involving state agencies—one involving the application of § 12-117 and one involving the application of the *Acarrequi* guidelines in cases involving condemnation actions.

The evolution of the Idaho Supreme Court's interpretation of Idaho Code § 12-117 began with *Roe v. Harris*, 128 Idaho 569, 917 P.2d 403 (1966), *abrogated in part by Rincover v. State, Dept. of Fin.*, 132 Idaho 547, 976 P.2d 473 (1996). In *Roe*, the Idaho Supreme Court addressed for the first time the interplay between § 12-117 and the private attorney general doctrine, which was based upon § 12-121. The Supreme Court concluded that § 12-117, and not the private

attorney general doctrine, was the appropriate basis for an award of attorney fees in a case against a state agency. *Id.* at 572-73, 917 P.2d at 406-07.

The next significant case involving § 12-117 attorney fee awards was *State v. Hagerman Water Right Owners, Inc.*, 130 Idaho 718, 947 P.2d 391 (1997), abrogated by *Syringa*, 155 Idaho at 67, 305 P.3d at 511. In that case, the Supreme Court reversed the district court's award of attorney fees against the Idaho Department of Water Resources pursuant to the private attorney general doctrine and concluded that § 12-117 provided the exclusive basis upon which a claimant could seek an award of attorney fees against a state agency. *Id.* at 723, 947 P.2d at 396. The application of the statute was later broadened to apply to attorney fee awards both for and against the State. *Potlatch Educ. Ass'n v. Potlatch Sch. Dist. No. 285*, 148 Idaho 630, 635, 226 P.3d 1277, 1282 (2010) (holding that § 12-117 "is the exclusive means for awarding attorney fees for the entities to which it applies.") (citing *Hagerman*, 130 Idaho at 723, 947 P.2d at 396) (additional internal citations omitted).

During this same period of time, the Idaho Supreme Court was also defining the basis and standards for awards of attorney fees in condemnation cases. *Acarrequi*, 105 Idaho at 877-78, 673 P.2d at 1071-72 (decided in 1983); *Talbot*, 120 Idaho at 829, 820 P.2d at 699 (decided in 1991); and *Jardine*, 130 Idaho at 321-22, 940 P.2d at 1140-41 (1997) (decided in 1997). *See also State ex rel. Winder v. Canyon Vista Fam. Ltd. P'ship*, 148 Idaho 718, 730, 228 P.3d 985, 997 (2010), *overruled in part by Telford*, 154 Idaho at 992-93, 303 P.3d at 1248-49. Yet, throughout the evolution of the two lines of cases, the Idaho Supreme Court gave no indication that the § 12-117 cases would supplant the *Acarrequi* principles or that the two standards could not co-exist simultaneously.

In fact, the Idaho Supreme Court has regularly applied both standards. In cases involving direct condemnation actions that reached a final determination of just compensation, the Court applied the *Acarrequi* standards, and in cases that did not, it applied either § 12-117 or the standard version of § 12-121, depending in part upon the basis for the attorney fee request. *Compare City of McCall v. Seubert*, 142 Idaho 580, 588, 130 P.3d 1118, 1126 (2006) (upholding trial court's award of fees in direct condemnation action based upon *Acarrequi* standards and granting award of attorney fees on appeal to prevailing parties); *Canyon Vista Fam. Ltd.*, 148 Idaho at 730-31, 228 P.3d at 997-98 (upholding trial court's award of attorney fees and awarding attorney fees on appeal in direct condemnation action based upon *Acarrequi* standards)[1], *with Covington v. Jefferson Cnty.*, 137 Idaho 777, 782-83, 53 P.3d 828, 833-34 (2002) (denying request for attorney fees on appeal made under Idaho Code § 12-121 and Rule 54 on grounds that inverse condemnation claims on appeal were not frivolous or unreasonable); *Alpine Village*, 154 Idaho at 939, 303 P.3d at 626 (denying request for attorney fees to plaintiff and awarding fees to city under § 12-117 where plaintiff's takings claims were dismissed and had no reasonable basis in law or fact).

A prime example of the Supreme Court's application of the attorney fee standards is in the first appeal that was taken in this case. *Grathol I*, 153 Idaho 87, 278 P.3d 957 (2012). The case involved (and still involves) a direct condemnation action. However, the issue on appeal was Grathol's challenge to the District Court's grant of early possession to ITD under Idaho Code § 7-721, and not the final determination of just compensation. On appeal, the Idaho

[1] The *Winder* case was overruled in part on other grounds in *Telford Lands LLC v. Cain*, 154 Idaho 981, 303 P.3d 1237 (2013).

Supreme Court affirmed the District Court's decision but denied ITD's request for attorney fees on appeal. *Id.* at 93, 278 P.3d at 963.

As noted in ITD's opening brief in the current appeal, the Supreme Court correctly applied § 12-117 to ITD's attorney fee request on Grathol's interlocutory appeal. ITD's Opening Br. at 67-68. The *Acarrequi* factors were not applicable to ITD's attorney fee request because (1) the issue presented was a challenge to the District Court's decision granting early possession of the Grathol property to ITD and not the broader issue of attorney fee awards at the conclusion of a condemnation case; (2) at the time of the appeal, the outcome of the case was unknown and the factors necessary for making a determination under the *Acarrequi* factors had not yet been decided in the case; and (3) without a determination of the underlying factors, the Court could not have applied the *Acarrequi* guidelines or made a determination of the propriety of an attorney fee award under *Acarrequi*.[2] Moreover, ITD did not request attorney fees on appeal under the *Acarrequi* line of cases because such a request would have been premature. Therefore the applicability of the *Acarrequi* guidelines was not at issue in *Grathol I.*

In sum, nothing in the Idaho Supreme Court's ruling on attorney fees in *Grathol I* indicates *any* intention by the Supreme Court to overrule either the *Acarrequi* line of cases or the entire statutory framework under Title 7, Ch. 7 governing the awards of attorney fees and costs at the conclusion of condemnation cases. Accordingly, the *Acarrequi* standard for attorney fee awards remains good law and is to be applied in condemnation actions.

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[2] The *Acarrequi* guidelines for attorney fee awards in condemnation cases include (1) whether ITD reasonably made a timely offer of settlement of at least 90 percent of the ultimate jury verdict, (2) whether the settlement offer was timely and not made "on the courthouse steps an hour prior to trial," and (3) whether the offer was made within a reasonable period after the institution of action. *Acarrequi*, 105 Idaho at 878, 673 P.2d at 1072; *Talbot*, 120 Idaho at 829, 820 P.2d at 699.

2. Under Current Idaho Law, § 12-117 Is Not The Exclusive Basis For Attorney Fee Awards In Cases Involving The State, And Attorney Fees May Be Awarded Under Any Statute That Expressly Applies To A State Agency.

During the pendency of the current appeal in this case, the Supreme Court clarified the applicability of § 12-117 in cases involving the State or other entities covered by the statutes. In the case of *Syringa,* 155 Idaho at 67, 305 P.3d at 511, the Supreme Court overruled its decision in *Hagerman* that Idaho Code § 12-117 is the exclusive means for awarding attorney fees in cases involving the State.[3] The Supreme Court concluded that the *Hagerman* ruling regarding the exclusivity of Idaho Code § 12-117 was "incorrect." *Id.* In *Syringa*, the Supreme Court held that the current state of the law in Idaho is that "*attorney fees may be awarded under any . . . statute* that expressly applies to a state agency or political subdivision," and that "*[Idaho Code § 12-117] is not the exclusive basis* upon which to seek an award of attorney fees against a state agency or political subdivision." *Id.* (emphasis added). Among the statutes specifically referenced by the Supreme Court as expressly applying to a state agency or political subdivision is § 12-121—which is the statutory basis for the *Acarrequi* standards. The Supreme Court in *Syringa* then remanded the case to the district court for a determination of whether the State was entitled to an award of attorney fees "under an applicable statute other than 12-117(1)." *Id.*

After issuing the *Syringa* decision in March 2013, the Court issued another decision, which *again* confirmed that attorney fees may be awarded to a state entity pursuant to statutes other than Idaho Code § 12-117. *Hehr v. City of McCall*, 155 Idaho 92, 99, 305 P.3d 536, 543 (2013) (Idaho Code § 12-117 *and* § 12-121 "are expressly applicable" to the city's motion for

[3] Grathol failed to cite, mention, or otherwise attempt to distinguish the *Syringa* case, despite it having been issued nearly four months prior to the date that Grathol submitted its reply brief.

attorney fees).[4] The recent decisions regarding § 12-117 are applicable to the instant case, since "[t]he usual rule is that decisions of [the Idaho Supreme Court] apply retroactively to all past and pending cases." *Athay v. Rich Cnty.*, 153 Idaho 815, 824, 291 P.3d 1014, 1023 (2012). Moreover, the Court's recent decisions in *Syringa* and *Hehr* are not necessarily a pronouncement of new law, but rather provide clarification and uniformity to the Court's prior decisions regarding attorney fee awards in cases involving the State, including the application of the *Acarrequi* standards in condemnation actions.

Thus, contrary to Grathol's argument, § 12-117 is *not* the exclusive basis for attorney fee awards in condemnation actions, and the District Court incorrectly applied § 12-117, rather than the *Acarrequi* standards, in denying ITD's motion for attorney fees.

3. The Cases Cited By Grathol Do Not Support The Conclusion That § 12-117 Applies To ITD's Attorney Fee Request.

In support of its argument that § 12-117 applies to ITD's motion for attorney fees in a condemnation case, Grathol cites to *Grathol I*, 153 Idaho 87, 278 P.3d 957 (2012); *City of Osburn v. Randel*, 152 Idaho 906, 277 P.3d 353 (2012); *Potlatch Educ. Ass'n v. Potlatch Sch. Dist. No. 285*, 148 Idaho 630, 226 P.3d 1277 (2010); and *Alpine Village Co. v. City of McCall*, 154 Idaho 930, 303 P.3d 617 (2013). While each of these cases applies § 12-117 to the respective attorney fee requests, none of the cases hold that § 12-117 applies to attorney fee applications at the conclusion of condemnation cases.

[4] Grathol failed to cite, mention, or otherwise attempt to distinguish the *Hehr* case, despite it having been issued weeks before Grathol submitted its reply brief.

In *Grathol I*, ITD did not request attorney fees under *Acarrequi*—nor could an award of attorney fees have been made in the case at the time of the appeal—because no determination had been made on the issues required for an analysis of the *Acarrequi* factors. In *Randel* and *Potlatch*, while the Supreme Court concluded that § 12-117 was the exclusive means for awarding attorney fees for the entities to which it applies, neither case addressed the applicability of *Acarrequi* in light of § 12-117 nor did the cases overrule any of the *Acarrequi* line of cases that have applied the standards over the last 30 years. *Randel*, 152 Idaho at 910, 277 P.3d at 357; *Potlatch*, 148 Idaho at 635, 226 P.2d at 1282.

Similarly, Grathol's reliance on *Alpine Village* is misplaced. According to Grathol, the case supports its argument that Idaho Code § 12-117 applies to condemnation actions. Grathol's Reply Br. at 43. However, Grathol's suggested interpretation of the *Alpine Village* case is not supported by its facts. First, in that case, the City of McCall requested an award of attorney fees on appeal, and not as part of the underlying inverse condemnation proceedings before the trial court. *Id.* at 939, 303 P.3d at 626. Second, the City did not request a fee award under the *Acarrequi* guidelines, and therefore the issue of whether the *Acarrequi* guidelines were applicable in light of § 12-117 was not presented on appeal. And third, the Court did not conclude that § 12-117 was the exclusive basis for attorney fee awards *in condemnation (or inverse condemnation) proceedings*, nor did it overrule the long-standing rules established in *Acarrequi*, which were re-affirmed by the Idaho Supreme Court just six days after the *Alpine Village* case. *Telford Lands*, 154 Idaho at 992, 303 P.3d at 1248 (citing *Acarrequi* and reaffirming that in condemnation cases, "section 12-121 permits the district court in its discretion

to award reasonable attorney fees without a finding that the condemnation claim was brought and pursued frivolously, unreasonably or without foundation.").

Grathol makes no effort to explain how *Alpine Village* is to be read in light of the *Telford* decision. Nor does it offer to explain how its cited cases square with the Supreme Court's recent decision in *Syringa*, which holds that "*attorney fees may be awarded under any . . . statute* that expressly applies to a state agency or political subdivision," and that "*[Idaho Code § 12-117] is not the exclusive basis* upon which to seek an award of attorney fees against a state agency or political subdivision" or *Hehr*, which concludes that § 12-117 *and* § 12-121 "are expressly applicable" to attorney fees requests in cases involving the state or political subdivisions. *Syringa*, 155 Idaho at 67, 305 P.3d at 511; *Hehr*, 155 Idaho at 99, 305 P.3d at 543. In sum, Grathol's argument that § 12-117 applies to condemnation actions is simply contrary to Idaho law on attorney fees.

C. The Idaho Supreme Court Recently Reaffirmed The Application Of The *Acarrequi* Standards In Condemnation Cases.

The continued viability of the *Acarrequi* standards in condemnation cases was confirmed as recently as June 2013 in the case of *Telford Lands*, 154 Idaho at 992, 303 P.3d at 1248. The case involved a condemnation action filed by Telford Lands LLC to construct an irrigation pipeline across the Cain's property. *Id.* at 984, 303 P.3d at 1240. Despite being unsuccessful in defending against Telford Lands' condemnation claim, the Cains sought an award of attorney fees under §§ 7-718 and 12-121. *Id.* at 992, 303 P.3d at 1248. On appeal from the district court's denial of the Cains' attorney fee request, the Idaho Supreme Court applied the *Acarrequi* standards to the facts of the condemnation action and upheld the district court's determination that the condemnor was the prevailing party and that the condemnees were not entitled to

attorney fees. *Id.* at 992-93, 303 P.3d at 1248-49. The Supreme Court held that "[w]ith respect to a condemnation claim, section 12-121 permits the district court in its discretion to award reasonable attorney fees to the condemnee without a finding that the condemnation claim was brought and pursued frivolously, unreasonably or without foundation." *Id.* at 992, 303 P.3d at 1248 (citing *Acarrequi*, 105 Idaho at 876-77, 673 P.2d at 1070-71).[5]

Despite the case having been issued more than a month before Grathol submitted its reply brief, Grathol failed to cite or make any mention of the *Telford* case. Nor did Grathol provide any explanation of how the Supreme Court's re-affirmance of the *Acarrequi* standard as governing attorney fee awards in condemnation actions squares with its assertion that § 12-117 applies to this case. The simple explanation is that Grathol's argument is wrong. Contrary to Grathol's suggestion otherwise, *Acarrequi* and its standards for attorney fee awards in condemnation cases remain good law and apply to this case.

In its brief, Grathol asserts that during the oral argument on ITD's motion for attorney fees and costs, ITD stated that it was not seeking fees under § 12-121 but rather under the "particularized rules for costs and attorney's fees that applies to condemnation cases." Grathol's Reply Br. at 42 (citing Tr. of Aug. 29, 2012). While Grathol's statement is technically correct, its suggestion that ITD is not claiming attorney fees under § 12-121—as the statute is applied by *Acarrequi* and subsequent cases—is misleading by omission. As discussed above, *Acarrequi*

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[5] Prior to the *Telford* decision, Idaho Code § 7-718 was one of the statutory bases—along with § 12-121—for an award of attorney fees in condemnation cases. However, the Idaho Supreme Court in *Telford* held that § 7-718 provided for the award of costs, not attorney fees, and it overruled its decision in *Canyon Vista Fam. Ltd. P'ship*, 148 Idaho at 731, 228 P.3d at 998 to the extent that it held otherwise. Therefore, after *Telford*, the bases for awards of attorney fees in condemnation cases, as held in *Acarrequi* and subsequent cases, are § 12-121 and Rules 54(d)(1) and 54(e)(3) of the Idaho Rules of Civil Procedure.

rejected the traditional application of § 12-121, which imposed the overlay of Rule 54(e)'s requirement that fees not be awarded absent a finding of frivolity, unreasonableness, or lack of foundation, and replaced it with a new set of rules for attorney fee awards—still based upon § 12-121—but which are specifically tailored to the unique characteristics of condemnation cases. *Acarrequi*, 105 Idaho at 876-77, 673 P.2d at 1070-71. ITD's statement at the attorney fee and cost hearing was intended to make clear that ITD was not seeking fees under the traditional application of § 12-121/Rule 54(e) framework, but rather under the § 12-121/*Acarrequi* standards.

D. Attorney Fees May Be Awarded To Condemnors In Exceptional Circumstances, Like Those Present In The Current Case.

Grathol spends much of its argument regarding ITD's attorney fees asserting that there is no basis for an award of attorney fees in favor of a condemnor. Grathol's Reply Br. at 37, 40, 42-50. Grathol's assertions are incorrect, and they ignore the Idaho Supreme Court's holdings to the contrary.

The award of attorney fees in condemnation cases are within the guided discretion of the trial court. *Jardine*, 130 Idaho at 320, 940 P.2d at 1139; *Telford*, 154 Idaho at 922, 303 P.3d at 1248. In *Acarrequi*, the Idaho Supreme Court held that while at the time it could not envision an award of attorneys' fees and costs to a condemnor, it left open the possibility for such an award "in the most extreme and unlikely situation[.]" *Id.*, 105 Idaho at 878, 673 P.2d at 1072. It is significant that the Court did not prohibit awards of costs and attorney fees to condemnors, but instead limited such awards to exceptional circumstances, such as those that exist in the present case.

Despite its attempted argument against any possibility of a fee award to condemnors, Grathol acknowledges the holding in *Acarrequi* in its opening brief on appeal and recognizes the significance of the holding as to cost and fee awards. Grathol's Opening Br. at 48. Specifically, Grathol noted how the Supreme Court in *Acarrequi* stated that it could not envision an award of attorney fees and costs to the condemnors except in the most extreme and unlikely situation. *Id.* Thus, Grathol effectively concedes that the Idaho Supreme Court has not prohibited attorney fee awards to condemnors, but rather limits such awards to exceptional cases.

E. Given The Outrageous Demands And Abusive And Improper Conduct Of Grathol Throughout This Case, ITD Should Be Awarded Its Reasonable Attorney Fees.

In this case, Grathol attempts to turn the condemnation of a portion of its property into the equivalent of winning the state lottery. Grathol bought the *entire* 56.8-acre parcel for $1,450,000 in May of 2008. The real estate market then *only* went down, dramatically, from May of 2008 to November 17, 2010, the date of taking in this case. Yet Grathol made demands and sought to recover as much as $7,369,500 for the taking of only 16.314 acres (*less than a third*) of the 56.8-acre parcel it bought for $1,450,000. *See* R. Ex. 156 at 715-16 (Grathol's Third Supplemental Answers and Responses to Discovery). At trial, after many of its claims clearly barred by law had been dismissed, Grathol sought as much as $3,093,360. R. Ex. J at 962-63 (Just Compensation).

Grathol's demands for compensation had no support from market data and no connection with fair market value. As a result, Grathol resorted to (1) improper appraisal methods; (2) claims for damages barred by law; (3) constantly changing the rationale and basis of its demands; (4) refusing to provide expert disclosures; and (5) presenting expert opinions that had

no foundation, no decipherable explanation, and were incapable of independent evaluation or verification.

1. Grathol's Abuses And Improper Conduct Prior To This Appeal.

In its Opening Brief, ITD provided a detailed list, explanation, and citations to the record of the many abuses and repeated instances of improper conduct by Grathol throughout this case. *See* ITD's Opening Br. at 74-79.

Grathol's misleading, abusive, and improper conduct has continued in its Reply Brief in this appeal, as shown below.

2. Grathol's Arguments Regarding The District Court's Ruling On The Larger Parcel Are False And Misleading.

Grathol repeatedly claims that the District Court ruled that the Larger Parcel imagined by its appraiser, Mr. Dewitt "Skip" Sherwood, was barred as a matter of law. In fact, Sherwood's appraisal did not do *any* Larger Parcel analysis, and made *no determination* of the Larger Parcel. R. Ex. 154 (Sherwood's Restricted Appraisal Report). Sherwood simply appraised 30 acres of the 56.8 acres owned by Grathol, *id.*, and then Grathol and its attorneys began referring to those 30 acres as Sherwood's opinion of the Larger Parcel.

More importantly, Grathol's claim that the District Court barred Sherwood's Larger Parcel determination as a matter of law is an incorrect statement of the District Court's ruling. The District Court did *not* bar Sherwood's opinion as a matter of law. It did not even reach the issue. The court, as the finder of fact, found Sherwood's opinion to be both unpersuasive and contrary to the facts of the case.

The decision Grathol has appealed, the *Post-Trial Memorandum Decision and Order for Judgment ("Post-Trial Mem. Decision & Order for J.")* entered May 25, 2012 (R. 1265), clearly shows that Grathol's repeated allegations that the District Court barred Sherwood's opinion as a matter of law are false. Despite repeated motions and showings by ITD that Sherwood's Larger Parcel conclusion was barred by law, the District Court refused to make that ruling and allowed Sherwood to testify fully about his appraisal, theories, and conclusions. The District Court made its decision on Sherwood's Larger Parcel conclusion as a *matter of fact*. As held by the District Court:

> [B]ecause this is a court trial, the Court has not needed to rule as a matter of law on the admissibility of Sherwood's larger parcel, although ITD has continuously requested such a ruling.
>
> Assuming Sherwood's methodology is permitted under Idaho law, *as finder of fact, this court finds* that the preponderance of the evidence favors finding that the appropriate larger parcel for this entire taking, as of the date of taking, is the entire 56.8 acres. The history of unity of title, contiguity, and unity of use for the 56.8 acres, and the evidence of potential future use, *supports a common sense, logical finding, based upon the factual record*, that the 56.8 acres is one integral unit. *Even Grathol's evidence of future use of the 56.8 acres is the same, to wit: commercial development. Grathol's proposed future project plans had design plans, admitted into evidence, showing an encroachment into Sherwood's "surplus" easterly 26 acres.* R. Exs. H (CLC Site Plan) and I (Hughes Site Plan).

R. 1265 at 1280-81 (*Post-Trial Mem. Decision & Order for J.)* (emphasis added). This ruling was preceded by several pages of *factual analysis* of the three components comprising the Larger Parcel determination: unity of title, contiguity, and unity of use. *Id.* at 1277-80. This ruling was also preceded by numerous statements by the District Court of the lack of persuasiveness and credibility of Sherwood's testimony. *See, for example, id.* at 1274 ("Sherwood also testified

that he assumed the wastewater system for the particular project Grathol had designed for the property would use the *easterly* 26 acres; however, because Sherwood's whole theory of valuation was based upon developing a commercial/retail project on the westerly 30 acres as the larger parcel, this Court finds his testimony *incomprehensible*.") (emphasis added).

The fact that the District Court's decision on the Larger Parcel was based on the facts, and not on a ruling that Sherwood's theory was barred as a matter of law, was reinforced at hearings following the trial. As stated by the court:

> And basically the trial went forward in many senses with a lot of evidence coming in because the trial court was not clear as to just exactly what the facts and the law were going to be, and I felt it important to allow the parties to try their theory of the case.

Tr. of Hrg. on ITD's Mot. for Atty Fees & Costs, at 38 (Aug. 29, 2012).

> [t]here's no survey. Where is this 30 acres? Well, nobody really knows. It's the west 30 acres. But, you know, where is it? Where's the line. Well, we don't know because the parcel's never existed.

Id. at 41.

> And when you get into the actual trying to apply it, it just doesn't make any sense. I mean, it's just totally unpersuasive. You have 30 acres, and Sherwood would subtract different sizes from the 30 acres, and sometimes it was – it was always greater than 13 acres and less than 14 acres. We just kind of wandered about because you just had whatever numbers he was going to come up with.

Id. at 42.

> So by the time I was through listening to Sherwood, the admissibility of his evidence was kind of moot because it just flat didn't make any sense. And then you combine it with his values – I mean, the 16 acres [the amount of the taking] was – what? Worth more that he paid for the 56.8 acres two years earlier in a period of

> declining [property values] – it just didn't make any sense. Just was not credible or believable.
>
> So I never really got to the admissibility issue because, when you listen to what he had to say, the intellectual framework doesn't work, things don't hang together, it's all smoke and mirrors, and the values he comes up with didn't have any relationship to reality. So, you know, it just wasn't believable.

Id. at 43 (brackets added).

In short, Grathol's repeated allegations in its Reply Brief that the District Court ruled that using Sherwood's hypothetical 30-acre parcel as the Larger Parcel was barred as a matter of law is repeatedly refuted by the record and the District Court decision Grathol has appealed. Grathol's allegations are false, misrepresent the record, and are designed to mislead this Court. For these reasons, Grathol's actions further justify an award of attorney fees to ITD.

Next, Grathol contends that the District Court was biased against Sherwood's theory or preordained its ruling prior to trial. Again, Grathol's argument is false and misrepresents the record. As stated by the District Court in its *Post-Trial Mem. Decision & Order for J.*:

> At the pre-trial Motion in Limine hearing, this Court cautioned Grathol that if this were a jury trial, the law was not clear as to whether this Court should allow the jury to consider Sherwood's methodology, because the highest and best use in this case is the same for the entire 56.8 acres. The fact that there is no existing Idaho law similar to *Wilson* would raise this Court's concern over allowing a jury to consider Sherwood's 30 acres as the larger parcel. It is even more problematic where the basis for defining the larger parcel is based not upon a different highest and best use, but solely upon a greater dollar value for the hypothetical parcel than for the rest of the parent tract. No case law on point has been submitted which this Court has found to address this issue. However, because this is a court trial, this Court has not needed to rule as a matter of law on the admissibility of

> Sherwood's larger parcel, although ITD has continuously requested such a ruling.

Id. at 16, R. 1265 at 1280.

Next, Grathol contends that the District Court ignored Sherwood's "market evidence" justifying a 30-acre larger parcel. This, again, is simply false. The District Court noted this "evidence" in its decision. *Id.* at 1274 (Sherwood "testified repeatedly that he used 30 acres because he could not find any instances where a commercial/retail development, that was comparable to the type of project he believed to be appropriate for the property, had needed more than 30 acres.").

Grathol also wrongly contends that there was no evidence that the Grathol property had "unity of use" or "integrated" use. This contention is contrary to *all* of the factual evidence in the case. The only thing to the contrary is the unsupported and "incomprehensible" *opinion* of Sherwood.

* After it purchased the property, Grathol had the entire 56.8-acre property rezoned commercial, not just 30 acres. ITD's Opening Br. at 30 (and citations therein).

* No evidence was presented of any plan by Grathol to re-rezone any portion of the property. *Id.*

* All witnesses, except Sherwood, testified that the "highest and best use" of the *entire* property was the same—future commercial development. *Id.* at 25-28.

* No witness from Grathol's company testified that Grathol would not develop the entire 56.8 acres. On the contrary, Grathol, through its part owner Alan Johnson, testified that "It's a 100 percent site" (Trial Tr., Vol. IV at 759: 24), referring to the 56.8 acre parcel it had purchased for commercial development and immediately rezoned the entire parcel for commercial development.

* Johnson further testified that "We do not, never have, never will, buy a piece of property that we do not intend to develop." Trial Tr., Vol. IV at 764:13-14.

* Sherwood's opinion that commercial developments never exceed 30 acres was refuted by *Grathol's purchase of 56.8 acres for commercial development.* ITD's Opening Br. at 20.

* Sherwood's opinion that commercial developments never exceed 30 acres was refuted by *his own comparable sales* that he used in his appraisal, which included commercial developments of *more than 30 acres*. *Id.* at 20-21.

* Grathol's argument that the property did not have unity of use is refuted *by its own site plans for the development on its property. Id.* at 21-23 and Exhibits shown therein. These site plans show development on more than the 30-acre parcel created by Sherwood. *Id.*

* Grathol's argument that the property did not have unity of use is refuted by the fact that the commercial development needs the land east of Sherwood's imaginary 30-acre parcel for waste water treatment for the development. *Id.* at 23-24.

In short, *no facts* offered either before, during, or after trial supported Grathol's contention that the Grathol property did not have unity of use because of and based on Sherwood's decision to appraise only 30 acres of the 56.8 acres owned by Grathol.

Next, Grathol overtly misrepresents the testimony of witness Jim Coleman. Grathol claims that Coleman testified that a wastewater system for the site plans designed by Grathol could be located entirely on the imaginary 30-acre parcel created by Sherwood. Grathol's Reply Br. at 26 ("Grathol's engineer, Jim Coleman, who testified that the water treatment systems could be located entirely on the western 30 acres and integrated into its development.'). Once again, Grathol's claims are incorrect and contrary to the record in this case.

To begin with, the District Court ruled that "any kind of testimony from Mr. Coleman designed to elicit any kind of inference that somehow this [wastewater treatment facility and required land application of treated wastewater] is something that could go on 30 acres rather

than the 56.8 acres is going to be stricken." Trial Tr., Vol. IV at 687:24-25 to 688:1-3. The court made this ruling because no such opinion from Coleman was disclosed prior to trial.

Consequently, Coleman *never* testified that the entire wastewater treatment facilities and the area needed for land application of treated wastewater could be located entirely on the west 30 acres along with all of the buildings and other infrastructure of the development planned by Grathol. *See* Coleman testimony, at Trial Tr., Vol. IV, at 659-699. Thus, Grathol's statement that Coleman testified that all of the wastewater facilities and land application of treated wastewater could be located entirely on Sherwood's imaginary 30-acre parcel is false and a misrepresentation of the record in this case.

Moreover, in his *actual* testimony, Coleman testified that Grathol would need 13 to 16 acres of land for wastewater treatment and land application of treated wastewater. *Id.* at 696:21 to 698:14. Since *none* of Grathol's site plans for its proposed development showed *any* land area on the hypothetical western 30-acre parcel for wastewater treatment or land application of treated wastewater (let alone *half* of the 30 acres), Coleman's testimony made clear that wastewater treatment facilities and land for disbursement of treated wastewater could *not* be located on the west 30 acres.

Next, Grathol falsely claims that ITD did not present any evidence that the Grathol property had unity of use or that Grathol could not build its planned development exclusively on the west 30 acres. This contention is contradicted by Grathol's own site plans that were admitted into evidence and cited by the District Court in its decision and that showed Grathol's plans for development on more than Sherwood's hypothetical 30-acre parcel. *See* ITD's Opening Br. at 21-23; R. Ex. H (CLC Site Plan) at 954; and Ex. H at 953 reproduced therein. *See also* R. 1265

at 1280-81 (*Post-Trial Mem. Decision & Order for J.*) (noting site plans developed by Grathol showing development on property east of Sherwood's hypothetical 30-acre parcel). Grathol's contention is also squarely refuted by Grathol's own witness, Jim Coleman, as noted above. In addition, ITD witness George Hedley testified that Grathol would need from 19 to 25 acres for the wastewater treatment system and land application for its treated wastewater, based on detailed analyses by senior engineers with David Evans and Associates. Trial Tr., Vol. IV at 726:11-727:1. Grathol never planned to develop just 30 acres of its 56.8-acre parcel, and its development plans could not be physically located entirely on the west 30 acres.

Grathol also falsely claims that the District Court rejected evidence that Grathol could not proceed with its development without using some or all of the eastern portion of the property. Grathol's Reply Br. at 26. In making this claim, Grathol cites to R. 1265 at 1274 (*Post-Trial Mem. Decision & Order for J.*). Grathol takes a few words of the decision out of context and then makes this incorrect and misleading argument. In its discussion on that page, the District Court notes that Sherwood testified that he used 30 acres in his appraisal because he could not find any commercial/retail development that needed more than 30 acres. *Id.* But, "Sherwood also testified that he assumed the wastewater system for the particular project Grathol had designed for the property would use the *easterly 26 acres*[.]" *Id.* In response to this, the court noted that "because Sherwood's whole theory of valuation was based upon developing a commercial/retail project on the westerly 30 acres as the larger parcel, this Court finds his testimony *incomprehensible*." *Id.* (emphasis added).

Since Sherwood's appraisal was based entirely on the premise that Grathol's proposed development would only need 30 acres, the District Court declared:

> Therefore, this Court rejects the suggestion that Grathol's proposed project required the easterly 26 acres in order to dispose of waste, because Grathol's theory of the larger parcel for this case was that it would not need more than the 30 acres to develop its commercial/retail project.

Id. All of the evidence, and Grathol's own site plans, showed that Grathol needed at least half of the 26.4 acres east of Sherwood's imaginary 30-acre parcel to build the project it plans. Consequently, the District Court's statement above was not a factual finding that the development did not need half or more of the east 26.4 acres. On the contrary, the court was making it very clear that Sherwood could not claim that the development only needed 30 acres or that commercial developments never exceed 30 acres *and simultaneously* testify that "he assumed the wastewater system for the particular project Grathol had designed for the property would use the *easterly 26 acres*[.]" *Id.* (emphasis added). Therefore, the court rejected that testimony by Sherwood. Grathol's misuse of the discussion in the court's decision is improper, misleading, and in keeping with its conduct throughout this case.

Next, Grathol cites cases for the proposition that "when there are no claims to severance damages to the remainder (or portions of the remainder), it is reasonable, appropriate and indeed *mandated* that the valuation be based on the economic unit actually impacted by the take." Grathol's Reply Br. at 16 (emphasis in original). This argument is incorrect and misleading for

the following reasons: (1) according to Grathol, it sought severance damages in this case;[6] (2) the language contained in the parenthesis above was inserted by Grathol into its discussion of the cases, thereby "creating" the proposition that if no claim for severance damages is made as to "portions of the remainder" then the rule of the cases applies; this "addition" or "insertion" into the case law is not supported by the cases cited, but rather is a legal creation of Grathol's own making; and (3) no witness testified that the 16.314 acres condemned was an "economic unit" that could be valued alone. All valuation witnesses except Sherwood valued the 56.8-acre parcel owned by Grathol. Sherwood valued an imaginary 30-acre portion of the Grathol property. He did not value the take area as a separate "economic unit" which is *the predicate* for the case law cited.

Lastly, as found throughout Grathol's first brief on appeal, the section of Grathol's Reply Brief on the Larger Parcel issue is filled with statements that appear to be statements of law. However, the statements are not supported by any citation to legal authority. The section is also filled with statements that appear to be principles or standards governing real estate appraisal or the real estate appraisal profession, but the statements are not supported by any authority, such as the Uniform Standards of Appraisal Practice or any other authority.

In short, Grathol has continued to abuse the judicial process by misrepresenting facts, the testimony of witnesses, and the bases and conclusions of the District Court decision. This

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[6] As discussed in section E.3 below, even though Grathol claims that it sought severance damages in this case, its expert valuation witness, Sherwood, testified that there was "zero" damages. R. 1265 at 1290 (*Post-Trial Mem. Decision and Order for J.* and Tr. of Hrg. on Mtn. for Atty Fees (Aug. 29, 2012) at 47. Additionally, Grathol's part owner testified to damages that he characterized as "severance damages" but were actually damages for construction delays, which are not recoverable in condemnation actions. *See* discussion and record citations in section E.3, *infra.*

further demonstrates that this is the case when attorney fees should be awarded to the condemnor as the prevailing party.

3. Grathol's Arguments Regarding Severance Damages Are Inaccurate And Misrepresent The Record.

Grathol contends that the District Court's determination that the remaining property did not suffer any severance damages is not supported by the evidence. Grathol's Reply Br. at 30-33. In making this argument, Grathol again makes numerous inaccurate statements and misrepresents the record.

First, Grathol's own appraiser, Sherwood, testified, unequivocally, that the remaining property suffered "zero" severance damages. *See* R. 1265 at 1290 (*Post-Trial Mem. Decision & Order for J.* ("There's zero severance, correct.")) and Tr. of Hrg. on Motion For Attorney Fees (Aug. 29, 2012) at 47 ("[Sherwood's] testimony that severance damages is zero *was credible and certainly comported with what the other evidence was.*") (brackets and emphasis added).

In addition, the two other professional real estate appraisers who testified at trial, Stan Moe and Larry Pynes, both testified that the Grathol property suffered *no severance damages*. Thus, the District Court's finding of no severance damages was amply supported by the evidence, including the testimony of the only real estate appraiser called by Grathol.

Grathol claims that Alan Johnson incorporated into his opinion of severance damages the approximately $1 million in additional utility costs alleged by Geoff Reeslund as being necessary to bring utilities to the western-most 0.4 acres of property that will be located on the other side of US-95 after the ITD Project. This claim is not correct and misrepresents the record.

* Johnson never testified that he included Reeslund's alleged increased utility costs in his determination of severance damages. *See* Johnson trial testimony, Trial Tr., Vol. IV at 751-816.

* Johnson's determination of severance damages were significantly lower than $1 million (*see* R. Ex. J at 962-63 (Just Compensation)), which shows that there was absolutely no correlation between, or reliance upon, Reeslund's testimony about alleged utility costs and Johnson's testimony regarding severance damages.

* Grathol freely admits that it was not seeking discrete severance damages based on Reeslund's testimony about alleged increased utility costs. *See* Grathol's Reply Br. at 30.

* Johnson's alleged severance damages were *not severance damages*. The calculations he labeled as "severance damages" (*see* R. Ex. J at 962-63 (Just Compensation)), were repeatedly shown to be a claim for damages based on *construction delay* which is *barred by law*. *See* ITD's Opening Br. at 56 and citations therein.

* ITD had to file several motions to strike Johnson's claim for damages for construction delay. Every time, Grathol avoided the motion by simply changing the "name" of the damages calculated by Johnson. However, despite the name changes, the calculations and dollar amounts remained exactly the same as the unlawful construction delay claim *every* time. *Id.*

* Johnson at no time testified that his so-called "severance damages" were based on a reduction in the fair market value of the remaining Grathol property, after the taking, due to increased utility costs or any other type of development costs. *See* Johnson trial testimony, Trial Tr., Vol. IV at 751-816. In other words, even Johnson did not believe that severance damages could or should be awarded based on Reeslund's testimony regarding utility costs.

So, in addition to making false and misleading statements about Johnson's testimony, Grathol again improperly attempts to recover unlawful damages for construction delay.

Grathol also misrepresents the testimony of ITD's witness, George Hedley. George Hedley and the engineering experts from David Evans and Associates, Inc., calculated the infrastructure and development costs for the mixed use, commercial/retail development planned by Grathol. Based on this work, Hedley testified that, both before and after the project, Grathol's proposed development was not financially feasible because in both scenarios it would cost more to develop the property than what Grathol paid for the land. Trial Tr., Vol. IV at 736:20-738:7.

In short, Hedley testified that it did not make any economic sense to develop the property in the manner proposed by Grathol.

Most of Grathol's argument on severance damages based on the testimony of Hedley focuses on the potential costs to develop the property after completion of the US-95 Project. Grathol's Reply Br. at 32. Grathol's argument takes Hedley's testimony out of context and then improperly mischaracterizes it as a potential source of severance damage.

* Hedley's testimony was not a before-and-after valuation of the property, nor did it represent any discussion or assessment of severance damages to the property.

* Hedley's testimony demonstrated that Grathol's proposed development was not economically feasible, and made no economic sense, because the costs to develop the property—both before the Project and after—were significantly higher than what Grathol paid for the property.

* It is improper to calculate severance damages based upon increased development costs, where there is no evidence that such costs resulted in a decrease in the property's value. *C&G, Inc. v. Canyon Highway Dist.*, 139 Idaho 140, 148, 75 P.3d 194, 202 (2003); Idaho Code § 7-711(2); IDJI2d 7-16.5; R. 734-37.

* No evidence was offered by any witness that the remaining property decreased in market value due to any alleged increase in development costs.

* Hedley's testimony was *not* that the actual development costs were greater *because of* the project. Rather, Hedley testified that the actual costs to develop the property as proposed by Grathol was "*about a million dollars less* because the right-of-way was not included." Trial Tr., Vol. IV at 736:6-10 (emphasis added). Grathol simply ignores this testimony.

* Although the estimated per-square-foot development costs were greater, *the total development costs were less after the ITD Project. Id.*

* Since Hedley did not testify to the fair market value of the property or any difference in the fair market value before or after the taking, his testimony cannot be used to justify an award of severance damages, particularly since he testified that Grathol's proposed commercial development was not financially or economically feasible *either before or after the Project.*

Again, Grathol misuses the misrepresented testimony of George Hedley to make an improper claim for severance damages.

4. Grathol's Reply Brief Wrongfully Persists In Attempting To Recover Damages Based On Sylvan Road. Such Claims Have Been Repeatedly Dismissed And Grathol's Arguments Are False And Misrepresent The Record.

Despite repeated dismissals by the District Court and by the Supreme Court, Grathol persists in attempting to recover damages based on Sylvan Road in its Reply Brief. Grathol's Reply Br. at 33-36. It claims the District Court should have allowed Alan Johnson to testify about the adverse impacts of Sylvan Road on Grathol's proposed development, so that Johnson could justify his opinion on "severance damages." *Id.* The fact that Grathol is barred by law from recovering compensation or damages based on Sylvan Road is addressed in detail in ITD's Opening Brief. *Id.* at 59-63.

Grathol's persistence on this issue is astonishing and represents the willful refusal to abide by the rulings of the District Court and the Supreme Court. Grathol's actions further bolster ITD's claim to recover reasonable attorney fees in this case.

Initially, Grathol claimed that ITD was condemning land for Sylvan Road and was planning to build Sylvan Road across Grathol's property, even though neither ITD's administrative order of condemnation nor ITD's complaint in this case sought any taking for Sylvan Road. Based on these facts, the District Court repeatedly held that ITD is not taking land for Sylvan Road and is not building Sylvan Road on the Grathol property. *See Grathol I*, ITD's Br. On Appeal in Supreme Court Docket No. 38511-2011, at 8 and 32-35, and the record citations therein (filed Nov. 4, 2011). Grathol appealed the District Court's ruling, and the

Supreme Court denied the appeal, finding that ITD is *not* condemning land for Sylvan Road. *See Grathol I*, 153 Idaho at 93, 278 P.3d at 963.

Nine months after the District Court's decision on ITD's Motion For Possession, Grathol submitted expert disclosures representing that Alan Johnson would testify to damages caused by the taking and construction of Sylvan Road. Therefore, despite the District Court's prior ruling and the Supreme Court decision affirming that ruling and barring this claim, ITD was forced to file a motion for summary judgment to dismiss any and all claims for compensation or damages based on Sylvan Road. *See* R. 308 at 311, 317-24 (ITD's Br. in Supp. of Mot. for Summ. J.).

After a hearing on ITD's motion on January 27, 2012 (a year after the first ruling on Sylvan Road), the District Court entered its order. R. 715-17 (Order Re: Pl.'s Mot. for Summ. J. (Feb. 3, 2012)). In that order, the Court held: "ITD's Motion for Summary Judgment re: a taking claim for Sylvan Road *and damages* for such alleged taking is granted, and this claim is hereby stricken." *Id.* at 716 (emphasis added). Thus, all claims for both an alleged taking and for damages based on Sylvan Road were dismissed on summary judgment. Grathol never appealed that decision.

Moreover, Alan Johnson freely admitted that he did not intend to offer any testimony of alleged severance damages based on Sylvan Road.

> Q. Mr. Johnson, in your valuation do you have any discrete number of damages, amount of damages attributable to a future construction of Sylvan Road?
>
> A. I don't believe so, no.

Q. And so that's not part of your testimony?

A. No.

Trial Tr., Vol. IV at 801:16-21.

Johnson had not disclosed any testimony of severance damages based on Sylvan Road prior to trial, and had no testimony to offer as to an amount of severance damages at trial. Given that and the previous rulings dismissing claims for compensation and damages based on Sylvan Road, the District Court did not err, and certainly did not commit *reversible* error, by excluding vague, non-specific testimony about an alleged impact on a proposed future development plan, based on a road that may or may not be built, at some time in the future, by someone other than ITD.

Further, if Sylvan Road is ever built, it will be Grathol's responsibility to build it to serve its commercial development and the multiple parcels and multiple commercial tenants within the development. *See Grathol I*, ITD's Br. On Appeal in Supreme Court Docket No. 38511-2011 at 9-11, 39-40, and the Kootenai County Ordinances referenced therein and attached to the brief as App. A. (filed Nov. 4, 2011). All commercial developers in Idaho are responsible for building roads within commercial developments. *Id.* (citing I.C. § 50-1309). Grathol cannot seek public compensation for a road that Grathol needs for its own private development.

Having failed, repeatedly, in its attempts to recover compensation and/or damages based on a taking for Sylvan Road, Grathol shifted its position, in response to ITD's motion for summary judgment, by claiming that Grathol would not have had to build Sylvan Road "but for" ITD's US-95 Project. Therefore, it argues, Grathol should still be compensated for impacts of Sylvan Road. This claim was simply incorrect and was rejected by the District Court in its ruling

dismissing the claim on ITD's Motion for Summary Judgment. *See* R. 715 at 716 (Order Re: Pl.'s Mot. For Summ. J. (Feb. 3, 2012)).

Grathol makes this same inaccurate and unfounded argument, yet again, in its Reply Brief. Grathol's Reply Br. at 34 ("ITD's project made the extension of a frontage road through Grathol's property, a foregone conclusion."). ITD should not have to keep re-litigating rulings that have already been made. Because it has had to do this and so many other unnecessary things in response to abuses and improper tactics by Grathol, ITD should be allowed to recover its reasonable attorney fees in this case.

Grathol's same argument, previously rejected by the District Court and not appealed by Grathol, is false and unfounded for the following reasons:

First, § 9-9-2 of the Kootenai County zoning ordinances regulating commercial zones requires that every "Commercial Lot shall have direct access from a public road." *See* R. 384 at 401 (Affidavit of Mary York in Support of Plaintiff ITD's Motion for Summary Judgment and Motion in Limine, Ex. 2 at 2 (R. 401)).

Section 10-3-1(B)(4)(e) of the Kootenai County zoning ordinances (identifying the services and infrastructure that the developer must construct to serve a commercial subdivision) requires "[p]ublicly-maintained road access to each lot, as approved by the Highway District." *See id.*, at 407-08. Thus, every individual lot within the 56-acre "before" commercial development and the 40-acre "after" commercial development will have to have access from a public road. All of the lots on a 56-acre development in the before condition could not have had frontage on US-95, with dozens of individual driveway accesses a few feet apart on US-95. No site plan was ever produced by Grathol in discovery or at trial that showed how the 56-acre

property could be developed with commercial uses without any interior road(s). In addition, in its opposition to ITD's motion for summary judgment, Grathol did not offer any testimony or evidence that the property could be commercially developed in the before condition (disregarding the ITD Project altogether) without any interior public road.

Section 10-3-1(D)(2) of the Kootenai County zoning ordinances also makes clear that the developer will be required to dedicate the fully constructed roads within the development to the county or local highway district: "Except for gated communities and common driveways approved by the Board [of county commissioners], roads and associated rights-of-way *shall be dedicated to the applicable highway agency.*" *Id.* at 410 (brackets and emphasis added). In addition, Idaho Code § 50-1309 also requires owners of new developments to "make a dedication of all public streets and rights-of-way shown on said plat." Grathol has repeatedly failed to respond to or even acknowledge the Kootenai County zoning ordinances cited above and the requirements of Idaho Code § 50-1309.

In support of its motion for summary judgment, ITD submitted a report from engineers and land planners with David Evans and Associates ("DEA"). *See* R. 384 at 499-520 (Affidavit of Mary York in Support of Plaintiff ITD's Motion for Summary Judgment and Motion in Limine, Ex. 11 (R. 499-520)). DEA reported that construction of interior roadways within the Grathol commercial development would be a requirement of commercial development approval *in both* the before condition (without the US-95 Project) and the after condition (with the US-95 Project). *Id.* at 505. In other words, the interior road, whether called Sylvan Road or any other name, would be required regardless of the US-95 Project, and was not "caused" by the Project. The need for the interior road and the cause of the road is Grathol's proposal to develop a large,

mixed-use commercial/retail development. The DEA report also states that interior roadways within the Grathol development would have to be dedicated to Lakes Highway District as a public roadway. *Id.*

In its reply brief, Grathol objected to ITD's references to the DEA Report because it was not admitted at trial. However, it was made part of the record on summary judgment, without objection by Grathol. Therefore, ITD may certainly refer to the report on issues previously raised by the parties and decided by the District Court.

It is undisputed that before the Project, Grathol sought to rezone its entire property to a commercial zone and that Kootenai County granted Grathol's application. *Grathol I*, R. 90 at 92 (Defendant's Responses to Plaintiff's Motion for Order Granting Possession of Real Property (January 10, 2011)). During that process, and *before* the ITD condemnation, the Kootenai County hearing examiner cited correspondence from the Lakes Highway District Engineer, stating that "[t]he Developer should be required to provide all accesses to this development from either Howard Road or the future Highway District frontage road." *See* R. 384 at 537 (York Aff. in Supp. of ITD's Mtn. for Summ. J. and Mtn. in Limine (Grathol's Rezone Application, at ¶ 2.12, Exhibit PA-5, Letter, Ex. 16) (R. 537)). The "Highway District frontage road" is what Grathol has consistently referred to as Sylvan Road, and would be required by and dedicated to Lakes Highway District, *not ITD*. This evidence shows that public road access will be required and it will be Kootenai County and Lakes Highway District that will require it. This correspondence was sent well *before* the condemnation action by ITD, and was applied to the proposed development in the "before" condition—prior to the US-95 Project.

All of the above information, exhibits, and authority were presented to the District Court on ITD's motion for summary judgment. *See* R. 305 and 308-58 (ITD's Br. in Supp. of Mot. for Summ. J.), at 321-22; and R. 648 at 661-64 (ITD's Reply Br. in Supp. of Mot. for Summ. J., and citations to the record and expert reports therein).

For all of these reasons, Grathol's continued attempts to recover compensation and/or damages based on Sylvan Road constitute vexatious litigation, harassment, and abuse of the judicial process, and justifies an award of attorney fees to ITD.

F. The District Court Erred In Applying Idaho Code § 12-117, Rather Than The *Acarrequi* Standards, To ITD's Motion For Attorney Fees And Its Ruling Therefore Must Be Reversed.

The District Court found ITD to be the prevailing party in this action and awarded ITD its costs as a matter of right and a small portion of its discretionary costs. However, despite its finding that ITD was the prevailing party, the District Court incorrectly applied § 12-117 and denied ITD's motion for attorney fees. The award of attorney fees is within the guided discretion of the trial court and will only be overturned upon a showing of abuse. *Jardine*, 130 Idaho at 320, 940 P.2d at 1139 (citing *Acarrequi*, 105 Idaho at 877, 673 P.2d at 1071). In this case, where the District Court failed to apply the *Acarrequi* standards to ITD's motion, its ruling on ITD's motion for attorney fees is properly reversed.

G. The District Court Correctly Applied The *Acarrequi* Guidelines In Its Award Of Costs As A Matter Of Right And Discretionary Costs To ITD.

Grathol argues that the District Court erred in its application of the *Acarrequi* guidelines, rather than the provisions of § 12-117, in its award of costs to ITD. As with Grathol's arguments regarding attorney fees, its position relating to cost awards in condemnation actions is similarly incorrect. Because Grathol's argument regarding the award of costs in this case is part of

Grathol's appeal and not part of ITD's cross-appeal, ITD does not address the issue of costs in this brief and instead relies upon the arguments contained in its brief in response to Grathol's appeal, which details the appropriate standards for cost awards in condemnation cases under *Acarrequi*, *Talbot,* and *Jardine*. ITD's Opening Br. at 79-82.

III. ITD REQUESTS THAT IT BE GRANTED ITS ATTORNEY FEES AND COSTS ON APPEAL

ITD respectfully requests that the Court award ITD its attorney fees and costs on appeal. ITD is the prevailing party in this matter and therefore is properly entitled to its attorney fees and costs under Idaho Code § 12-121 and *Acarrequi*, 105 Idaho at 876-78, 673 P.2d at 1070-72 and its progeny. ITD made an offer of settlement that was at least 90 percent of the verdict in this case; ITD's settlement offer of $1.1 million was timely; Grathol did not voluntarily grant possession of the property; and its opposition to ITD's possession of the property had no legitimate basis or grounds. As discussed above, ITD is entitled to an award of its costs and attorney fees under *Acarrequi*, and particularly so in the present case due to the extreme and abusive conduct by Grathol throughout this case. ITD has set forth in detail the abuses and improper litigation tactics exercised by Grathol. *See* Section XII.E of ITD's Opening Br. and Section II.F above. Grathol has continued its pattern of abuse and improper conduct in this appeal including, unbelievably, once again seeking to recover compensation or damages based on Sylvan Road.

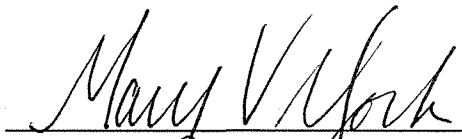
In the alternative, ITD requests an award of its attorney fees and costs on appeal pursuant to Idaho Code §§ 12-117 and 12-121. Grathol has pursued this appeal unreasonably and without foundation or support in law. Grathol's appeal is based solely on its disagreement with the District Court's factual findings and evaluation of the credibility of the witnesses on the issues of

the larger parcel, severance damages, and Sylvan Road, which is not a proper basis for an appeal. Moreover, Grathol made no proper or meaningful attempt to establish any errors of law by the District Court. And finally, although Grathol implies otherwise, the District Court did not bar any of Grathol's witnesses from testifying on any subject or issue, except claims for compensation or damages based on Sylvan Road, which were dismissed multiple times before trial.

Based on the foregoing, ITD should be awarded its attorney fees and costs as the prevailing party in this case, and its attorney fees and costs on appeal.

DATED this 26th day of September, 2013.

Respectfully submitted,

By 

Mary V. York, of the firm
Steven C. Bowman, of the firm
Special Deputy Attorneys General
HOLLAND & HART LLP

J. Tim Thomas
Deputy Attorney General
Idaho Transportation Department

Attorneys for Plaintiff-Respondent-Cross-Appellant, Idaho Transportation Department

CERTIFICATE OF SERVICE

I hereby certify that on this 26th day of September, 2013, I caused to be served two true and correct copies of the foregoing by the method indicated below, and addressed to the following:

Douglas S. Marfice, Esq. Christopher D. Gabbert, Esq. RAMSDEN & LYONS, LLP P.O. Box 1336 Coeur d'Alene, ID 83816-1336	☒ ☒ ☐ ☐ ☐	U.S. Mail Email Hand Delivered Overnight Mail Telecopy (Fax)

Mary V. York

of HOLLAND & HART LLP

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